SUPREME COURT, U. S.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 801

NEIL A. WOODINGTON,

Appellant-Petitioner,

vs.

STATE OF WISCONSIN,

Appellee-Respondent.

MOTION OF APPELLEE TO DISMISS APPEAL
BRIEF IN SUPPORT OF MOTION
BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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December 22, 1966

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MOTION OF APPELLEE TO DISMISS APPEAL

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal from the final judgment of the Supreme Court of Wisconsin in the above action, *State v. Woodington*, 31 Wis. 2d 151, 182a, 142 N. W. 2d 810, 143 N. W. 2d 753 (1966), on the ground that the appeal does not present a substantial federal question.

OPINIONS BELOW

The decision of the Dane County Circuit Court (the trial court) denying Appellant's motion to dismiss the information (R. 3-18) is unreported and is printed in Appendix B hereto, *infra*, pp. 106-121. The opinion of the Wisconsin Supreme Court is reported at 31 Wis. 2d 151, 142 N. W. 2d 810 and the per curiam opinion of the Wisconsin Supreme Court denying Appellant's motion for rehearing is reported at 31 Wis. 2d 182a, 143 N. W. 2d 753.

JURISDICTION

Inasmuch as only one of the questions raised by Appellant is appealable, his Jurisdictional Statement contains the statutory requisites for both appeal and petition for certiorari. As to those questions for which the proper mode of review is by petition for certiorari, the appeal papers shall be regarded and acted on as a petition for certiorari. 28 U. S. C. § 2103.

QUESTION PRESENTED BY APPEAL

I. Whether the phrase "exercise of reasonable care" and the word "misleading" provide a "sufficient warning" that Appellant's conduct was proscribed.

QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI

II. Whether the conduct of the agents of the state during the investigative phase of the proceeding constituted a violation of due process of law under the Fourteenth Amendment making a dismissal of the information mandatory.

III. Whether the pre-trial publicity was of such magnitude that the trial in this case was "inherently lacking in due process."

IV. Whether that portion of the charge to the jury which defined "materiality" amounted to a directed verdict as to one of the five elements of the crime thereby depriving Defendant of due process of law guaranteed by the Fourteenth Amendment.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 189.19 (2) (d) of the Wisconsin Statutes provides as follows:

> "189.19 Criminal liability.
>
> * * *
>
> "(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment adviser or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:
>
> * * *
>
> "(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The Appellant and his co-defendant, Robert Kelly, were convicted by jury verdict of filing a false or misleading financial statement with the Wisconsin Department of Securities. This false or misleading statement of the financial condition as of March 31, 1964 of Allied Development Corporation (hereinafter referred to as Allied) was submitted by Appellant to the Securities Department for a dual purpose: 1. To afford the Director of the Wisconsin Department of Securities an opportunity to examine Allied's financial position prior to granting or denying an application by Allied for registration of its securities; and 2. To be made a part of the prospectus which would be furnished to the potential buyers of Allied stock once registration for public sale was obtained.

The Appellant and Mr. Kelly, President and Vice President of Allied respectively, were engaged in a complicated check exchange or check kiting scheme involving four separate checking accounts: Appellant's personal account; an Allied account; an account under the name of Brooks & Woodington, Inc., which was a company dominated by Appellant; and an account under the name of Hoard's Creameries, Inc., a company managed and operated by Mr. Kelly. In this manner Allied's cash position was so manipulated as to show a large fictitious balance as of March 31, 1964, the date of the financial statement. The Wisconsin Supreme Court found that "the jury could conclude that there was a very carefully contrived scheme to inflate Allied's account for the crucial March 31st date." (R. 110, Appellant's Jur. Statement, 124)

This scheme came to light as a result of an investigation into the affairs of Madison American Guaranty Insurance Company (hereinafter referred to as MAGIC). The Appellant was also active in the management of MAGIC, and when it became apparent during the investigation of that company that there were close financial ties between Allied and MAGIC, the Defendant's financial manipulations were uncovered.

These investigations began in August of 1964 and resulted in the then Attorney General of Wisconsin signing a criminal complaint against the Appellant on September 30, 1964, which complaint was given to the Dane County District Attorney with a request that he commence prosecution. The district attorney conducted his own investigation between September 30, 1964 and November 6, 1964, the date on which Appellant and Mr. Kelly were charged with the crime which is the subject of this appeal. A preliminary hearing was held from December 9, 1964 to December 22, 1964, and the two defendants were bound over for trial on December 29, 1964.

On April 5, 1965, prior to trial, the Appellant moved to dismiss the information filed against him on three grounds, only two of which are pertinent to this appeal: that the statute of which he was charged with violating was vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution; and that the conduct of the agents of the State of Wisconsin during the investigative phase of this proceeding amounted to a violation of due process of law contrary to the Fourteenth Amendment to the United States Constitution. These motions are printed in Appendix B hereto, *infra*, p. 105. The

denial of these motions by the trial court and the subsequent affirmance of the decision by the Wisconsin Supreme Court constitute the basis for Questions I and II as stated by Appellee-Respondent.

Trial commenced on July 12, 1965, and a verdict of guilty was returned on July 29, 1965. During trial, Appellant submitted a requested instruction defining "materiality" (R. 29-31) which was refused, and he now contends the instruction given violated his constitutional rights. Appellant first raised the issue of whether he received a fair and impartial trial by motion for rehearing in the Wisconsin Supreme Court dated May 7, 1966. Said motion was denied by the state court for the reason that the issue was not properly before them, because it had been raised for the first time by motion for rehearing. (R. 156, Appellant's Jur. Statement 138-139)

SUMMARY OF ARGUMENT

A. (1) The charge to the jury in fact added to the statute the words which Appellant contends would make the negligence portion of the statute constitutional. Even without such clarification, the words "reasonable care" set a standard of conduct known to all men, particularly to the Appellant, who is a graduate lawyer.

(2) As defined in the charge to the jury, the statute requires the statement or representation to be misleading to either the Securities Department or a potential investor. The entire statute makes this obvious to any reasonable person; therefore the case of *Coplin v. United States*, 88 F. 2d 652, 657 (9th Cir. 1937), upholding the

use of the word "misleading" as not vague and indefinite, is authority for the case at bar.

B. (1) Inasmuch as the Defendant did not allege that his trial was unfair until he made a motion for rehearing in the state court, he is precluded from bringing the question to this court.

(2) Defendant's failure to bring to this court a record of any unfairness and his failure to raise the issue before the state court constitute potent evidence that he received a fair trial.

C. The publicity created by candidates for public office was directed at the opposing political party, and although it indirectly involved Mr. Woodington, such publicity did not prejudice his case. To dismiss the case because of such pubilicity punishes the public, for it would destroy by judicial decree the public's obligation to criticize the administration of criminal justice.

D. The Defendant did not state his objection to the instruction defining "materiality" in terms which fairly apprised either the prosecution or the courts that he claimed a violation of his Federal Constitutional rights. Although the question of "materiality" of the inaccurate representation is a question for the court rather than the jury, the state court construed the instructions to mean that the issue was given to the jury to decide. Inasmuch as the state court never reached the federal question (if any was raised), the decision was based on an adequate non-federal ground.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I. THE ALLEGED UNCONSTITUTIONALITY OF THE WISCONSIN STATUTE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

There is a strong presumption of constitutionality of all statutes. *United States v. National Dairy Corp.*, 372 U. S. 29, 32 (1963). The whole purpose of the "Blue Sky Laws," of which this statute is a part, is to "protect the public by preventing the sale of worthless and fraudulent securities." *State v. Eisbach*, 263 Wis. 554, 556, 57 N. W. 2d 725, 726 (1953); *State v. Rogers*, 226 Wis. 39, 45, 275 N. W. 910, 913 (1937). This statute was, therefore, enacted by the Wisconsin Legislature in exercise of its police power to protect the health, safety and general welfare of the citizens. *Kreutzer v. Westfahl*, 187 Wis. 463, 482, 484, 204 N. W. 595, 603 (1925); *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 552 (1917).

A. *The Phrase "In the Exercise of Reasonable Care" is a Well-defined Standard of Conduct Known to All Men.*

The Appellant contends that a portion of the statute is unconstitutionally vague and indefinite because it requires him to exercise reasonable care in order to ascertain if information is false or misleading. He concedes that if the statue were to contain the additional italicized words as follows, it would be constitutionally certain:

> ". . . which statement or representation he knows or in the exercise of reasonable care *in his particular capacity* should know to be false or misleading."[1]

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[1]Appellant's Jur. Statement, 20.

The trial court instructed the jury that a failure to exercise reasonable care (negligence) is a:

> "want of, or failure to exercise, that care and caution which a person of ordinary intelligence and prudence usually exercises *in a like or similar situation, work or operation, under like or similar circumstances.*" (R. 22, emphasis added)

This instruction was approved by the Wisconsin Supreme Court, (R. 114)[2]. As construed and applied by the Wisconsin courts, the statute contains the essence of Appellant's suggested addition and is therefore constitutional by his own admission. Inasmuch as Appellant must, for the purpose of this appeal, accept the state court's construction of the statute (*Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513 (1933); *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 688 (1959)), there is no federal question with respect to the negligence portion of the statute.

The Defendant is an attorney at law who graduated with honors from the University of Wisconsin Law School; consequently, this definition of negligence and construction of the statute was obvious to him. He, therefore, "could reasonably understand from the statutory language that the conduct described in the [information] was proscribed by the Act." *United States v. National Dairy Corp.*, 372 U. S. 29, 34 (1963).

The issue is not if twelve members of a jury might disagree with one's choice of conduct, but rather, in determining whether a statute is vague and indefinite, it must be ascertained if there is a reasonable degree of certainty

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[2]Appellant's Jur. Statement, 129-130.

in the standard of conduct set out by the statute. *Boyce Motor Lines v. United States*, 342 U. S. 337, 340 (1952). Our statute deals with the conduct of a reasonable man, a standard which is litigated and argued in criminal and civil cases every day in our state and federal courts. The conduct of a reasonable man is a known standard for all persons in our society regardless of whether or not they are lawyers; thus, it is a sufficiently definite standard to include within a criminal statute.[3]

The words of the statute must have a fixed meaning in themselves, or a meaning made definite by a statutory or judicial definition, or by the context in which they are used, or some other legitimate aid to its construction. *Connally v. General Construction Co.*, 269 U. S. 385, 395 (1926). Thus, in a case relied on by Appellant, *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921), the Court considered a statute which said that it was unlawful for any person "to make any unjust or unreasonable rate or charge. . . ." *Id.*, at 81-82, n. 1. The Court held the statute unconstitutional, and it has been explained that the reason for this holding was that "the standard . . . was without a meaningful referent in business practice or usage." *United States v. National Dairy Corp.*, 372 U. S. 29, 36 (1963). The *Cohen Grocery Case* is, therefore, not applicable to the statute in question, because section 189.19 (2) (d) has a meaningful referent both in usage and in the common law —the standard of reasonable care.

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[3]This is "an extension of rather than a departure from the values symbolized by the mens rea concept." Packer, **Mens Rea and the Supreme Court**, Sup. Ct. Rev. 107, 145 (1962); see also A. L. I., **Model Penal Code, Tent. Draft No. 4, Comments § 2.02, pp. 126-127 (1956)**.

Appellant also relies on *Cline v. Frink Dairy Co.*, 274 U. S. 445 (1927), as authority for the proposition that the reasonable care standard is void as being too vague, but the Court in that case said:

> "But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit. It is true that, on an issue *like negligence*, i.e., a rule of conduct for the average man in the avoidance of injury to his neighbors, every one may be held to observe it either on the civil or criminal side of the court. *It is a standard of human conduct which all are reasonably charged with knowing* and which must be enforced against every one in order that society can safely exist." *Id.*, at 464 (Emphasis added).

There is, then, a distinct difference between what is a reasonable profit or price and whether a man's conduct constitutes reasonable care. It is clear that the latter standard is a constitutional one.

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct," *United States v. Ragen*, 314 U. S. 513, 523 (1942).

B. *The Use of the Word "Misleading" in the Context of the Statute Afforded This Appellant a "Practical Guide to Permissible Conduct."*

Appellant contends that the word "misleading" is vague and indefinite because he cannot tell in advance of filing a financial statement whether it is the Director of the Securities Department who is not to be misled or if it is the potential investor who is not to be misled.[4] The jury was instructed that they had to find that the cash item on the balance sheet was misleading to *either* the Wisconsin Department of Securities or a prospective purchaser of stock. (R. 19-20) The Wisconsin Supreme Court found nothing erroneous in this instruction. (R. 113)[5] Inasmuch as the financial statement was required to be submitted to the Director of the Department of Securities, Appellant agrees that the director is one of the relevant addressees.[6] Section 189.13 and 189.17 of the Wisconsin Statutes make it equally clear that the public investor is not to be misled;[7] thus there are two addressees as stated in the instructions. Appellant knew that the financial statement, as a part of the prospectus, would be used by both the Department of Securities and prospective investors; consequently, Appellant in fact knew the answer to the dilemma which he attempts to create for this Court.

In *Coplin v. United States*, 88 F. 2d 652 (9th Cir. 1937), *Cert.* denied, 301 U. S. 703 (1937), the court of appeals had under consideration 15 U. S. C. § 77q (a) (2), which

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[4]Appellant's Jur. Statement, 24.

[5]Id., at 127-128.

[6]Id., at 24.

[7]Pertinent portions of these two sections are printed in Appendix A, infra, pp. 101-103.

was a part of the Securities Act of 1933. That particular section made it unlawful to sell securities,

> "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Securities Act of 1933, Title I, c. 38, § 17, 48 Stat. 84.

The court of appeals' opinion that the word "misleading" is not vague and indefinite was quoted by the trial court in its ruling on Appellant's motion to dismiss in the case at bar. (R. 16-17; Appendix B, *infra*, pp. 119-120) The word "misleading" is also found in 15 U. S. C. § 77x (Securities Act of 1933, Title I, c. 38, § 24, 48 Stat. 87), 78ff (a) (Securities Exchange Act of 1934, c. 404, § 32, 48 Stat. 904), and 79z-3 (Public Utility Act of 1935, Title I, c. 687, § 29, 49 Stat. 836). See *United States v. Guterma*, 189 F. Supp. 265, 274-275 (S. D. N. Y. 1960); reversed on other grounds, 281 F. 2d 742 (2nd Cir. 1960).

Appellant contends that an officer of a corporation "simply cannot determine whether particular statements will subject him to criminal liability."[8] Justice Holmes has answered a similar argument:

> "But we imagine that no one not in search of trouble would feel any." *United States v. Wurzbach*, 280 U. S. 396, 399 (1930).

In filing a financial statement, the Wisconsin Legislature holds the Appellant to the standard of a reasonable

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[8]Appellant's Jur. Statement, 24.

man—a standard which, like the word "misleading," is known and understood not only in law, but by every citizen in our community. The statute is, therefore, constitutional.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

As Appellant indicates in his jurisdictional statement,[9] the remaining questions raised by his appeal papers constitute a petition for certiorari. 28 U. S. C. § 2103. As to those issues, Defendant must show that there are "special and important reasons" for a review on writ of certiorari. Rule 19 (1).

II. UNDER THE CIRCUMSTANCES OF THIS CASE, THE ISSUE OF WHETHER DEFENDANT RECEIVED A FAIR TRIAL DOES NOT INVOLVE "SPECIAL AND IMPORTANT REASONS" FOR REVIEW BY THIS COURT.

A. *The Question was Not Properly Raised Before the Wisconsin Courts.*

Defendant concedes in his argument that he did not raise the issue of the fairness of his trial until he made a motion for rehearing before the Wisconsin Supreme Court.[10] The Wisconsin Supreme Court denied the motion for rehearing because it was not timely. (R. 156)[11] This Court has consistently held that it will not review a federal ques-

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[9]Appellant's Jur. Statement, 2-3.

[10]Id., at 43.

[11]Id., at 139.

tion which is raised for the first time by motion for rehearing unless the state court actually entertains the question and decides it. *Bowe v. Scott*, 233 U. S. 658, 663 (1914); *American Surety Co. v. Baldwin*, 287 U. S. 156, 163 (1932); *Herndon v. Georgia*, 295 U. S. 441, 443 (1935); *Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945). If this were not the rule, a party could present each of his constitutional issues to the state court on a piecemeal basis, and there would be no end to litigation.

An exception to the above rule exists if the motion for rehearing presented the first opportunity to raise the federal claim. *Herndon v. Georgia*, 295 U. S. 441, 444 (1935) and cases cited therein. No new and revolutionary law was created by the case of *Sheppard v. Maxwell*, 384 U. S. 333 (1966), to justify any contention that Defendant was, prior to rehearing, unaware of his right to a fair trial in the face of adverse publicity. The cases of *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); and *Estes v. Texas*, 381 U. S. 532 (1965), were available to Defendant as authority for raising the issue if he desired to do so. As pointed out by the Wisconsin Supreme Court in its per curiam opinion, the Defendant specifically declined to rely on the "rationale" of those cases in his original appeal. (R. 155)[12] Defendant, therefore, was aware of his right but failed to timely present the constitutional issue to the Wisconsin Supreme Court. It is not unfair or arbitrary to refuse to decide a question which the state court has not had an opportunity to adequately consider and decide; consequently, Defendant cannot now raise the issue as an afterthought because of *Sheppard v. Maxwell*.

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[12]Appellant's Jur. Statement, 137-138.

B. *There is No Merit to Defendant's Claim that He was Denied a Fair Trial.*

In an effort to make his trial correspond with the facts of the *Sheppard* case, the Defendant makes reference to the trial court's instructions to the jury about using news media during the trial and to the failure to sequester the jury.

The trial judge, however, did raise *sua sponte* the question of sequestration of the jury with counsel, and he ordered the jury sequestered. When it became difficult to select a jury, Mr. Woodington, after a conference with his counsel, withdrew his request for sequestration. (R. 145-148). If it was error, Mr. Woodington created it. If the judge had ordered the jury sequestered in spite of Mr. Woodington's request, this Defendant would now be alleging that ruling as a denial of his right to a fair trial.

Unfortunately, Mr. Woodington does not provide this Court with a record of the instructions by the trial court to the jury with respect to the news media, nor does he contend that any objections were made to the instructions given or that he requested other instructions. We must, therefore, conclude that the instructions in this case were more than the "suggestions" and "requests" criticized in the *Sheppard* case.

In addition, Defendant does not provides a record of the *voir dire* examination;[18] he makes no showing of extensive and prejudicial publicity during the trial; he shows no evidence of community prejudice; he specifically declined an invitation to move for a change of venue (R. 142-144;

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[18]He did attempt to supply such a transcript with his motion for rehearing. (R. 156; Appellant's Jur. Statement, 138).

R. 11-12[14]); and he made no motion for a continuance. All of these failures, along with the fact that Defendant did not believe the issue was important enough to raise by appeal to the state court, indicate that he in fact received a fair trial. *Stroble v. California*, 343 U. S. 181, 193-195 (1952); *Darcy v. Handy*, 351 U. S. 454, 463 (1956).

The trial of this case took place over eight months after charges were brought against the defendant, and in the entire record of this case, there is not a whisper of argument or speck of evidence that Mr. Woodington did not at that time receive the fair and impartial trial in the calm judicial atmosphere to which he was entitled.

III. THE CONDUCT OF THE AGENTS OF THE STATE DURING THE INVESTIGATIVE PHASE OF THIS CASE FOR WHICH DEFENDANT REQUESTS A DISMISSAL OF THE INFORMATION DOES NOT RAISE A QUESTION INVOLVING "SPECIAL AND IMPORTANT REASONS" FOR REVIEW ON WRIT OF CERTIORARI.

It must be conceded that there was publicity surrounding the investigative phase of this case. The Defendants issued press releases and purchased full page advertisements in the Madison newspapers. The then attorney general publicly criticized the governor, the insurance commissioner, and the district attorney for failure to assist in the investigation and for failure to act on his allegations. The district attorney answered his charges.

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[14]Appendix B. infra, pp. 114-115.

The general election which precipitated some of the publicity was held on Tuesday, November 3, 1966. Although the district attorney received the then attorney general's sworn complaints on September 30, 1964, he did not act on the charges until after the election; thus he prevented the actual court action from becoming a political issue. Subsequent to the election, there was no improper "conduct by agents of the state," and any publicity which occurred thereafter was straight news reporting.

Defendant would like us to believe that the publicity prior to the election was directed at him personally. It is obvious, however, that publicity emanating from the then attorney general said little about Mr. Woodington. It may be true that the then attorney general as a Republican was "out to get" the insurance commissioner and the governor as members of the opposite political party. There is, however, a distinct difference between the then attorney general's treatment of the Defendant and his treatment of the commissioner and the governor in the public press releases. The Democrats were accused of corruption, but Mr. Woodington's guilt or innocence was to be determined by a court of law.

In his public statements, the then attorney general continually refers to the issue being one of guilt or innocence of Mr. Woodington and Mr. Kelly. Never does the attorney general state that Mr. Woodington is guilty. Never does he recite the facts of the case. See *Sheppard v. Maxwell*, 384 U. S. 333, 337-342 (1966). Compare the then attorney general's conduct with that of the prosecuting attorney and other government officials in *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) (while defendant's criminal

trial was pending, a Congressional Committee conducted public hearings as part of an investigation of the defendant); *Stroble v. California*, 343 U. S. 181 (1952) (release to press by D. A. of defendant's confession and D. A. stating his opinion as to defendant's guilt); *Irvin v. Dowd*, 366 U. S. 717 (1961) (issuance of press releases by D. A. and the police after arrest); and *United States v. Denno*, 313 F. 2d 364 (2nd Cir. 1963), *Cert.* denied, 372 U. S. 978 (1963) (D. A. released information about confession and commented that the defendant was sane and must get the chair; prison records on the defendant were released to the press).

It is difficult to understand how the conduct of certain Republican candidates for public office and of the Madison newspapers can be labeled as actions of the State of Wisconsin. If criminal charges are to be *dismissed* because of the public comments of candidates for public office, members of political groups, and partisan newspapers; either democratic politics must go or the criminal jury trial must go—they could not exist together under such rules. Although Defendant attempts to liken his case to that of *Sheppard v. Maxwell*, this Court did not dismiss the charges because of the gross publicity in that case, but ordered a new trial. The decision of this Court in *United States v. Blue*, 384 U. S. 251 (1966), which reversed a lower court's dismissal of a criminal prosecution because of a violation of Fifth Amendment rights is equally appropriate to Defendant's demand for dismissal:

> "So drastic a step . . . would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Id.*, at 255.

In its opinion, the Wisconsin Supreme Court considered at length two cases involving a motion to dismiss under circumstances similar to the case at bar—*Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) and *Commonwealth v. Geagan*, 339 Mass. 487, 159 N. E. 2d 870 (1959), *Cert.* denied 361 U. S. 895 (1959). (R. 101-103)[15] The state court also relied on the decision of this Court in *Frank v. Mangum*, 237 U. S. 309 (1915). (R. 104-105)[16] Respondent cannot improve on the reasoning of those cases in contesting Defendant's position.

On the record which Defendant brings to this Court and on the record which he took to the Wisconsin Supreme Court, it must be concluded that Mr. Woodington received a fair trial; and "there could be no constitutional infirmity . . . if petitioner actually received a trial by an impartial jury." *Beck v. Washington*, 369 U. S. 541, 556 (1962).

IV. THE FEDERAL QUESTION RAISED BY DEFENDANT'S ATTACK ON THE CONSTITUTIONALITY OF THE INSTRUCTION DEFINING "MATERIALITY" WAS NOT PRESENTED TO THE WISCONSIN COURTS NOR DECIDED BY THE WISCONSIN COURTS.

The Wisconsin Supreme Court determined that the charge to the jury left to the jury the determination of whether the cash item on the balance sheet was a material representation and that the instruction as a whole was a correct statement of the law. (R. 111-112)[17] Defend-

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[15] Appellant's Jur. Statement, 109-113.
[16] Id., at 115-116.
[17] Id., at 126-127.

ant, however, now maintains that his constitutional rights were violated because he interprets one sentence of that instruction as constituting a directed verdict on one element of the offense. The Wisconsin Supreme Court disagreed with Defendant's interpretation of the meaning of the words used in the instruction and, therefore, decided the issue on an adequate and independent non-federal ground which is not reviewable in this Court. *Radio Station WOW v. Johnson*, 326 U. S. 120, 129 (1945); *Herb v. Pitcairn*, 324 U. S. 117, 125-126 (1945). This rule is enforced even when the non-federal grounds has been wrongly decided. *Wolfe v. North Carolina*, 364 U. S. 177, 195 (1960).

Equally dispositive of this issue, is the fact that at no time in the Wisconsin courts did the Defendant attack the instruction defining "materiality" as violating his federal constitutional rights. Defendant has the burden to show that he properly raised the federal question in the state courts.

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U. S. 63, 67 (1928)

Defendant claimed before the state courts that the instruction deprived him of his right to a jury trial.[18] Such gen-

[18]See for instance Defendant's Motion for a New Trial. (R. 43-45)

eral words do not raise a constitutional issue, but even if they did, it would be presumed to be an allegation of a violation of the state constitution. *Bowe v. Scott*, 233 U. S. 658, 665 (1914).

Even for his present appeal, Defendant, in his Notice of Appeal (R. 123) and statement of Questions Presented,[19] does not state that the instruction violated any particular portion of the United States Constitution. The argument in the Jurisdictional Statement, of course, does mention the Fourteenth Amendment; however, it is too late to raise a federal issue for the first time in this Court. *White River Co. v. Arkansas*, 279 U. S. 692, 700 (1929); *Whitney v. California*, 274 U. S. 357, 362 (1927).

Even if the issue had been properly presented to the Wisconsin trial and appellate courts and even if the state court had determined that the question of "materiality" was for the court to decide, such a decision would be clearly consistent with previous federal decisions. *Sinclair v. United States*, 279 U. S. 263, 298-299 (1929); *Sica v. United States*, 325 F. 2d 831, 835 n. 4 (9th Cir. 1963), *Cert.* denied, 376 U. S. 952 (1964).

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[19] Appellant's Jur. Statement, 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the appeal should be dismissed and certiorari denied.

Respectfully submitted,

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